SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 689

LOUIS FAMIANO,

Petitioner,

vs.

GERALD ENYEART A/K/A GERRY ENYEART AND CHARLES ENYEART,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION.

QUESTIONS PRESENTED.

1. May a plaintiff who files a diversity action at law in the District Court withdraw his request for jury trial without the consent of his opponent?

2. May a Federal District Court dismiss a cause for want of prosecution when the plaintiff refuses to proceed to trial on the morning set for that trial?

3. What is the proper division of functions between judge and jury where a Maritime claim is filed at law, a jury trial is requested, and one of two defendants requests limited liability by his answer to the complaint?

STATEMENT.

This diversity action was brought to recover damages for personal injuries claimed to have been suffered by the plaintiff when he fell from water skis while being towed behind a boat being operated on Lake Michigan by the defendant Charles Enyeart. The boat was owned by the defendant Gerald Enyeart, Charles' father. The District Court dismissed the action for want of prosecution pursuant to Rule 41(b), Federal Rules of Civil Procedure, when, on the day fixed for trial, the plaintiff refused to proceed with the trial of the cause to a jury.

Plaintiff's initial complaint, filed September 22, 1965, was denominated a "Complaint at Law". The first paragraph contains allegations of diversity of citizenship and amount in controversy in customary form. Indorsed in the caption was the phrase, "Plaintiff Demands Trial by Jury". (Tr. 1)

The defendants filed Answer and later, on July 28, 1966, the defendant, Gerald Enyeart, filed a motion for Summary Judgment together with supporting brief and affidavits. (Tr. pp. 21-31) The plaintiff countered with an amended complaint (Tr. 33) which the court permitted to be filed by order entered August 26, 1966, at the same time denying Gerald Enyeart's motion for Summary Judgment. (Tr. 39)

The amended complaint was denominated an "Amended Complaint at Law" and also bore the indorsement "Plaintiff Demands Trial by Jury". (Tr. 33)

The defendants filed separate answers to the plaintiff's amended complaint at law. The answer of the defendant, Charles Enyeart, denied negligence and pleaded affirmative defenses. (Tr. 55) The answer of the defendant, Gerald Enyeart, owner of the motor boat, denied negligence and pleaded affirmative defenses. (Tr. 50) Gerald

Enyeart also pleaded the Admiralty defense of limitation of liability pursuant to 46 U. S. C. A. Sec. 183 et seq. (Tr. 53-54) The plaintiff moved to strike the limited liability defense of the defendant Gerald Enyeart. (Tr. 82) This motion was briefed and argued by the parties and was overruled by the Court on May 4, 1967. (Tr. 127) The Court, on the plaintiff's motion to vacate its order of May 4th, re-examined and confirmed its action in denying dismissal of the answer of limited liability in an order entered May 25, 1967 and an accompanying memorandum. (Tr. 155) A pre-trial order was entered by the court on September 6, 1967. (Tr. 169) The order listed as contested issues of law, at paragraph H, questions regarding the applicability of admiralty or common law procedure and whether the plaintiff was entitled to a jury trial as against both defendants. (Tr. 173-174) The parties were then requested by the Court to submit trial briefs with reference to the legal questions listed in Paragraph H of the Pre-Trial Order.

The plaintiff contended in his Pre-Trial Brief, filed September 22, 1967, that he was entitled to a jury trial as to both defendants. The plaintiff argued that his suit had been filed on the "law side" of the court under the "Saving to Suitors Clause" of the Judiciary Act of 1789 and cited authorities sustaining his right to a jury trial. (Tr. 183-184)

The defendants, in their trial brief, agreed that the plaintiff was entitled to a jury trial as against both defendants, suggesting that the Court reserve for its own decision only those issues peculiar to the defense of limited liability raised by the defendant Gerald Enyeart. (Tr. 190)

At the Pre-Trial conference held May 29, 1967 the case was set for jury trial on October 2, 1967 and the trial date is reflected in the last paragraph of the Pre-Trial Order entered by the court. (Tr. 177) On Wednesday, September

27, 1967 the plaintiff filed a motion stating that "the plaintiff elects to have all issues tried in admiralty" and requesting that the action be tried to the court in admiralty without the intervention of a jury. (Tr. 200) The arguments of counsel were heard by the court on Friday, September 29, 1967 (docket entries 4) and the court reserved judgment until the following Monday, October 2, 1967, the scheduled first day of the trial. On the morning of October 2, 1967, the cause was called for trial and the court announced that the plaintiff's motion to dispense with a jury trial would be denied. The plaintiff refused to go forward with the trial, and upon defendant's motion pursuant to Rule 41(b) of the Federal Rules of Civil Procedure the District Court dismissed the action. (Tr. 210-219)

ARGUMENT.

I.

THERE IS NO CONFLICT WITH THE DECISIONS OF THIS COURT.

The owner of a vessel involved in an accident may request limitation of liability in one of two ways. He may file an original petition in the District Court requesting limitation, or he may plead limitation as a partial defense in answer to a suit filed against him.

Where there are multiple claimants and an inadequate fund, the only way in which an owner can effectively claim limited liability is by filing an original petition in Admiralty in the District Court. The Court then enters an injunction restraining prosecution of the several claims anywhere but in the limitation proceeding. A monition (notice) is issued to all claimants advising them of the injunction and to present their claims to the Admiralty Court within a limited time. The claims are marshalled and if limited liability is decreed a pro rata distribution is made to the various claimants. A concourse of claims is provided, the owner is protected from multiple suits in diverse jurisdictions and the Admiralty Court is empowered to grant full relief to all the parties whether limitation is granted or denied.

Gilmore & Black, *Admiralty,* § 10-17 (1957);

The Linseed King, 285 U. S. 502, 52 S. Ct. 450 (1932);

British Transport Commission v. *United States,* 354 U. S. 129, 77 S. Ct. 1103 (1957);

Hartford A. & I. Co. v. *Southern Pac. Co.,* 273 U. S. 207, 47 S. Ct. 357 (1927).

All of the authorities cited in the petition for certiorari are illustrative of the "original petition" method of raising the defense of limited liability. The decisions cited by the petitioner are sound; many are landmark cases in the development of the procedure for handling original-petition, multiple-claimant situations. They simply are not applicable to the case of the single District Court plaintiff where limitation is requested by the defendant in his answer.

II.

THE PROCEDURE APPROVED BY THE COURTS BELOW IS CORRECT.

The instant case involves a single personal injury plaintiff who alleged diversity of citizenship and filed his suit at law in the District Court, requesting a jury trial. One of the two defendants requested limited liability by his answer to an amended complaint.

In *Murray* v. *New York Central R. R. Co.*, 171 F. Supp. 80 (S. D. N. Y. 1959), the plaintiff, an injured seaman, filed his Jones Act suit at law in the District Court, claiming diversity of citizenship. In its answer the defendant pleaded limitation of liability as a partial defense. There was a trial to a jury of the plaintiff's claim which resulted in a verdict of $75,000.00. The Court reserved decision to itself on the limitation question and, having heard the evidence, held that the defendant was entitled to limited liability. A commissioner was appointed to determine the value of the vessels involved, which was found to be $16,000.00, and a judgment was entered for plaintiff in that amount.

The plaintiff took an appeal; *Murray* v. *New York Central R. R. Co.*, 287 F. 2d 152 (2d Cir. 1961), cert. denied 366 U. S. 945 (1961). The Court of Appeals for the Second Circuit affirmed the decision of the District

Court and confirmed the division of function between judge and jury which had been followed below.

The Court of Appeals for the Fourth Circuit has also approved this procedure. *Hudgins* v. *Gregory,* 219 F. 2d 255 (4th Cir. 1955). In *Hudgins* the plaintiff brought a civil action under the Jones Act and tried his case to a jury which gave him a verdict for $32,000.00. The owners then asked to be heard on their request for limited liability, pleaded in their answer to an amended complaint. After hearing supplemental evidence the District Court granted the defendants request for limited liability. The result was affirmed by the Court of Appeals.

Substantially the same result was reached by a District Court in New Orleans in *Doughty* v. *Nebel Towing Co.,* 270 F. Supp. 957 (E. D. La. 1967). The claimant asked maintenance and cure and damages under the Jones Act requesting a jury trial. The defendant asked limitation by answer. A dispute developed between the parties over whether the issues arising from the request for limitation should be tried to the jury or reserved for the Court.

The Judge notes the strength of the federal policy favoring jury trials flowing from the Seventh Amendment to the Constitution, and the decisions of this Court in *Fitzgerald* v. *United States Lines Co.,* 374 U. S. 16 (1963) and *Dairy Queen, Inc.* v. *Wood,* 369 U. S. 469 (1962), and holds that most all of the issues growing out of the limitation defense can be submitted to the jury. The court specifically reserves for its own decision the question of the value of the vessel, and concludes: "In all other respects the motion is denied, and the other issues relative to the limitation of liability claimed by the defendant will be tried by the Court alone, as an Admiralty Court, after the jury arrives at a verdict."

Of course the right of the parties to a jury trial is equal and co-extensive. The plaintiff's "Complaint at Law"

and "Amended Complaint at Law" (Tr. p. 1, Tr. p. 33) both bore the indorsement in the caption "Plaintiff Demands Trial By Jury." In his pre-trial brief, filed shortly before the trial date, plaintiff argued that he had a right to jury trial against both defendants. (Tr. 184) It was not until three court days before the day set for trial that the plaintiff reversed his field, cut back sharply, and tried to waive a jury trial.

The last sentence of Rule 38(d), Federal Rules of Civil Procedure, provides, "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties." The defendants did not consent, and had every right to rely upon the plaintiff's jury request.

2B Barron & Holtzoff, *Federal Practice and Procedure* § 877;
5 *Moore's Federal Practice,* ¶ 38.35(1) p. 270; ¶ 38.45 p. 344.

The cases thus establish the principle that the right of either party to a jury trial is not lost where legal claims are intermingled with distinctively admiralty claims. The injured seaman may request maintenance and cure in his action at law. The owner may request limited liability in his answer. Neither party is deprived of his right to a jury trial.

It thus appears from the authorities available that the District Court approached the problem correctly and that proper procedure required submission of all issues to the jury, reserving for decision by the Court only such questions as were distinctive to the owner's request for limited liability.

III.

THE PROCEDURE APPROVED BELOW IS NOT CONTRARY TO THE PRINCIPLE TO BE DEDUCED FROM FITZGERALD v. UNITED STATES LINES CO.

The plaintiff contends in his petition for certiorari that the procedure approved below contravenes the principle announced by this Court in *Fitzgerald* v. *U. S. Lines Co.*, 374 U. S. 16 (1963).

In *Fitzgerald* this Court held that when a claim for maintenance and cure (a distinctive admiralty remedy) was joined with a Jones Act claim (where there is a statutory right to jury trial), and both claims arise out of the same occurrence, both should be submitted to the jury for determination. As both claims are liability claims submission of both to the jury avoids problems of res judicata and collateral estoppel which might arise if two fact finders were used. Also, the problem of double recovery, or too small a recovery, which might arise with two trials to two fact finders is avoided. The case involved, in Mr. Justice Black's language ". . . one claim split conceptually into separate parts because of historical developments." The historical policy favoring jury trials was given force and the plaintiff was permitted jury trial of his claim for maintenance and cure.

In the instant case it was the plaintiff who sought to avoid jury trial contrary to the principle to be deduced from *Fitzgerald.*

Here there was no bifurcated cause of action, but only a single personal injury claim to be tried to the jury. No problems with the doctrines of res judicata or collateral estoppel could arise because all liability questions were to be tried to the jury.

No problem could arise regarding the size of the award

since all damage issues were to be tried to the jury. Two separate trials would not be required as the judge could likely determine the limitation question (should liability be found) on the evidence presented in the jury trial, just as Judge Murphy did in *Murray* v. *New York Central R. R. Co.* If the jury found that the owner was not liable, his plea for limited liability would have been moot.

Time is not wasted, circuity is avoided and the policy favoring jury trials is given effect.

IV.

THE DISMISSAL OF PLAINTIFF'S CAUSE WAS NOT AN ABUSE OF DISCRETION.

Based upon an erroneous view of the law applicable to his case, the plaintiff willfully and deliberately refused to proceed with the trial.

The Federal District Courts have inherent power to dismiss a cause for want of prosecution either on the motion of a party or on their own motion. In *Link* v. *Wabash R. R. Co.*, 370 U. S. 626, 82 S. Ct. 1386 (1962), Mr. Justice Harlan speaking for the Court said:

> "The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." (370 U. S. at 630-631.)

Justice Harlan further stated that such dismissals for want of prosecution would be reviewed on appeal only for an abuse of the trial court's discretion.

The refusal of a plaintiff to proceed to trial on a date set for trial some time in advance is an appropriate basis

for a dismissal with prejudice under Rule 41(b) of the Federal Rules of Civil Procedure.

> *Jameson* v. *DuComb,* 275 F. 2d 293 (7 Cir. 1960);
> *Sandee Mfg. Co.* v. *Rohm & Hass Co.,* 298 F. 2d 41 (7 Cir. 1962);
> *Lynch* v. *National Bondholders Corp.,* 2 F. R. D. 376 (E. D. Mich. 1942).

What were the circumstances surrounding the dismissal of this case? Judge Grant recites several in the transcript of the proceedings on the morning set for trial. (Tr. 208-219, Petitioner's Appendix "A")

The suit had been pending for more than two years and for more than two years the plaintiff had steadfastly maintained and insisted upon his right to a jury trial. The case was assigned a trial setting at the Pre-Trial Conference held May 29, 1967, more than four months earlier. The Pre-Trial Order stated:

> "The probable length of trial will be one week. The case is set down for trial on October 2, 1967, at 9:30 A.M. before a jury." (Tr. 177)

On September 22, 1967, the plaintiff filed his trial brief in which he contended:

> "Plaintiff is entitled to a jury trial as to both defendants under the 'saving to suitors' clause set forth above." (Tr. 184)

and went on to cite authorities sustaining that position. Then just five days later and on the eve of trial the plaintiff flip-flopped and contended that the whole case was in Admiralty and that no one had a right to jury trial.

The lawyers, parties and witnesses were prepared for trial and had arranged their schedules so as to be present for an anticipated week of trial. Subpoenas were prepared and issued with checks for mileage and witness fees. The

Clerk and Marshal had wasted their time in summoning and sequestering the jury panel. The time of the prospective jurors was wasted. (Seventeen jurors were present to hear this case, Tr. 210.) The funds of the United States were needlessly spent, at ten dollars per juror plus ten cents per mile.

Most important of all, the Court had "blocked out" an entire week of its calendar and reserved the time for the trial. It was then too late to call another case for trial during that week—even too late to schedule pre-trial conferences. The Court's calendar did not move. One week of trial time was wasted.

It is no surprise that this Court has said:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts." *Link* v. *Wabash R.R. Co.*, 370 U. S. 626 at 629-630, 83 S. Ct. 1386 at 1388 (1962).

The plaintiff's refusal to go to trial can be nothing more nor less than a willful and deliberate refusal, based only on a disagreement with the court's view of the law. The plaintiff did not complain that he was not ready for trial or seek a continuance. He must have been ready to accept the court trial he was requesting.

Suppose a plaintiff is erroneously required to try his case to a jury. The error may well be harmless, but even if prejudicial a new trial is not necessary since the cause may be remanded for the entry of findings of fact and judgment by the trial judge. On the other hand, if a party is erroneously deprived of a jury, a second trial—to a jury—would be necessary on remand. All of the plaintiff's contentions concerning his right to a court trial would have been preserved on appeal from a jury verdict.

The remedy for a disagreement with the Judge about the law is rather well understood to be an appeal from a final decision on the merits.

The plaintiff's deliberate refusal to proceed to trial is even worse than the situation in the cases cited above where a lawyer failed to show up, or sought a continuance of the trial date. The whole system of judicial administration will fall if an attorney or a party can successfully refuse to go to trial any time he disagrees with the court's view of the law.

CONCLUSION.

The petitioner's refusal to go to trial on the morning his case was called for trial was based upon an erroneous view of the law. The authorities relied upon by him, in his petition for certiorari, are inapplicable to the case of the single District Court plaintiff where limitation is raised as a defense. The procedure which the Courts below proposed to follow contravenes no decision of this Court and is in harmony with the decisions in other Circuits.

None of the procedural questions concerning limitation of liability were ever reached in this case because of the petitioner's refusal to proceed to trial. The remedy for a disagreement with the Judge about the law is an appeal from a final decision on the merits.

A dismissal for want of prosecution is the appropriate result when a party deliberately refuses to proceed on the day set for trial. The petition should be denied.

Respectfully submitted,

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